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REDACTED

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF MILFORD

S.C. 19350

STATE OF CONNECTICUT

V.

WILLIAM FAY

BRIEF OF THE DEFENDANT-APPELLANT

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National Institutes of Health, U.S. National Library of Medicine, "Diazepam" (last modified Oct. 1, 2010), available at http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682047.html (last visited June 29, 2015 22

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NATURE OF THE PROCEEDINGS

This is an appeal by the defendant, William Fay, following a jury trial in the Judicial District of Milford before Markle, J. The defendant was charged with the murder of his brother, D.F.[1] At the conclusion of the trial, the defendant was convicted of the lesser-included offense of manslaughter in the second degree with a firearm in violation of Conn. Gen. Stat. § 53a-56a. The defendant received a sentence of ten years incarceration suspended after eight years, with five years of probation.

The defendant's appeal was filed on July 3, 2014. The defendant remains incarcerated.

FACTUAL BACKGROUND

The Evidence

This case arose from the shooting of D.F. by his brother, the defendant, William Fay on July 8, 2010. Several aspects of this case were uncontested. The parties stipulated that at the time of the incident, D.F. and William Fay were co-tenants at the premises at 43 Lester Street in West Haven, and that William Fay used deadly physical force against D.F. on July 8, 2010. Tr. 5/1/13 at 630. The parties also stipulated that the decedent, D.F., was intoxicated and had a blood alcohol content of 0.161. Tr. 4/25/13 at 442. The primary issue in dispute was whether D.F. was the initial aggressor, as William Fay averred that the shooting was in self-defense.

The state's theory of the case was derived from statements of the defendant to police officers and emergency personnel who responded to the incident, and the testimony of experts who attempted to piece together the sequence of events through forensic

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[1] Due to the discussion of issues pertaining to the decedent's mental health, he will be referred to throughout the brief and the appendix by his initials, D.F.

evidence. The state claimed that this evidence demonstrated that William Fay was the initial aggressor, and that his self-defense claim would not stand.

William Fay testified at trial, not only about the events of the evening in question, but also about the behavior of his brother in the period leading up to the incident. Mr. Fay testified that in the months prior to the shooting, D.F. was increasingly depressed. Tr. 4/30/13 at 563. D.F. lost his job due to work-related depression, and grew even more depressed following the loss of his dog. Id. at 555, 563. As a result, D.F.'s consumption of alcohol intensified. Id. at 563. William Fay testified that he knew D.F. was seeing a psychiatrist because William periodically accompanied D.F. to the appointments. Id. William also saw the prescription bottles for medications prescribed to D.F., which included Risperdal, Prozac, Valium, and Librium. Id. at 558-59. The state successfully objected to Mr. Fay testifying about whether D.F. was receiving any medication or therapy in conjunction with his depression. Id. at 556. After D.F.'s dog died, there were two occasions where D.F. had attacked William. Id. at 578. Furthermore, D.F. was of significantly larger stature than the defendant, with D.F. weighing approximately 200 lbs., and William Fay weighing approximately 135 lbs. Id. at 586. D.F. kept a gun under his bed for home protection.[2] Id. at 552, 560.

An upstairs neighbor testified that on the evening of the shooting, William and D.F. were sitting on their front porch drinking. Id. At one point, D.F. put William in a headlock, and the struggle that ensued resulted in a broken chair. Tr. 4/23/13 at 31, 33. William Fay testified that when they returned to the house, D.F. went to the bathroom, came back into the living room, and a verbal altercation ensued. Tr. 4/30/13 at 570. The loaded gun was

[2] One of the crime scene experts, Tammy Murray, testified that the gun in D.F.'s bedroom was registered to D.F. Tr. 4/24/13 at 280.

on the coffee table. Id. at 571. They both reached for the gun, but William got it first. Id. at 572. They both fell back into their chairs. Id. at 573. William Fay pointed the gun at D.F. and asked him not to get out of his chair, but when D.F. got up, William fired one shot into D.F.'s arm. Id. at 575. D.F. then started to charge him, prompting William to yell "stop" and to fire a second shot blindly into D.F.'s torso. Id. at 576. William Fay testified he was certain his brother was going to kill him because D.F. had attacked him before. Id. at 578. D.F. subsequently grabbed the gun from William's hands, fired and grazed William's head with a bullet, causing William to lose consciousness. Id. When William regained consciousness, he called 911 to report his brother had been shot. Id. at 585. D.F. was taken to the hospital for treatment, where tests indicated his blood alcohol content was 0.161. Tr. 4/25/13 at 442. D.F. subsequently succumbed to his injuries.

Motion Seeking Disclosure of Decedent's Psychiatric Records

Among the items collected from the crime scene were several prescription bottles containing medications prescribed to D.F. The medications, which included Risperidone (Risperdal), Diazepam (Valium), Chlordiazepoxide (Librium), and Fluoxetine (Prozac), were prescribed by D.F.'s treating psychiatrist at the Veterans Administration Hospital. See Attachments to State's Motion in Limine (A56-A59).

On August 7, 2012, prior to the commencement of trial, defense counsel filed a Motion for Order to Compel the Production of Medical Records for In Camera Inspection seeking psychiatric records of D.F. from the Veterans' Administration Hospital. (A29). Two similar motions were filed on October 17, 2012: one was directed to the Veterans' Administration Hospital, and the other was directed to Dr. Richard E. Kravitz, D.F.'s treating psychiatrist at the time of the incident. (A37; A40). In support of these motions, counsel

stated that "[m]edications belonging to the decedent seized on the premises including Risperdal indicate that the decedent was taking medications that are used to treat aggressive behavior and may cause aggressive behavior when taken with drugs or alcohol," that "quantities of marijuana and alcohol" were at the scene, suggesting that D.F. had ingested these items shortly before his death, and that a review of D.F.'s history for aggressive behavior was necessary to present the self-defense claim. (A37, A40).

At a hearing on December 5, 2012, the parties addressed the defendants' motions. Tr. 12/5/12 at 2-6. Defense counsel noted that it wanted the records from Dr. Kravitz because he prescribed the medications and the defendant suspected that the medication was prescribed due to aggressive behavior by D.F. Id. at 3. At that time, the state's attorney noted "you're going to get the records. There's no question about that. It's a matter of when." Id. at 5.

At a February 1, 2013, motions hearing, defense counsel indicated that the defendant would be seeking medical records of D.F. since it appeared that he was taking antipsychotic medications at the time of the incident. Tr. 2/1/13 at 8. Counsel further argued that those prescription drugs, when mixed with alcohol and other drugs, could lead to aggressive behavior. Id. Defense counsel requested an in camera inspection to determine whether there was a relationship between the drugs and the combination of drug and alcohol abuse, and to determine if the records contained any exculpatory information. Id. at 8-9. The trial judge noted that she lacked the skills to make such a determination, and proposed that the court review the records to see if they contained certain references, such as an indication of whether the medications were prescribed, and then the defendant could file a motion to allow an expert to examine those records relevant to the claim of self-

defense. Id. at 10. The court granted the motion for in camera inspection, and defense counsel was directed to subpoena the records to the clerk's office. Id. at 12.

On April 2, 2013, the parties returned to court on the defendant's request for an evidentiary hearing. See Motion for Evidentiary Hearing (A43). At the court's direction, defense counsel had issued a subpoena to Dr. Kravitz, D.F.'s treating psychiatrist, who produced the records to the clerk.[3] Tr. 4/2/13 at 3. The court acknowledged that defense counsel had articulated in his motion what he anticipated the records might show, but the motion did not address the issue of privilege and the fact that the pertinent statute protected disclosure of all records unless there was a waiver from the patient or the administrator of the estate. Id. at 4. The administrator of D.F.'s estate, who was the father of D.F. and the defendant, did not want to be involved, and therefore was unavailable to waive the privilege codified at Conn. Gen. Stat. § 52-146d. Id. at 5.

Defense counsel argued that even in the absence of a waiver, any existing privilege was outweighed by the defendant's Sixth Amendment right. Id. The state argued that the statutory privilege applied and that therefore the records could not be disclosed. Id. at 6. Both the trial court and the state cited this Court's decision in State v. Kemah, 289 Conn. 411 (2008), for the proposition that the privilege contained in Conn. Gen. Stat. § 52-146e has a broad sweep and that that the court lacked the statutory authority to pierce the privilege in the absence of a waiver. Id. at 6. Defense counsel argued that Kemah was inapposite because unlike the instant case, which concerned the psychiatric records of a deceased patient, Kemah concerned the scope of a testifying witness' waiver. Id. at 8.

[3] Dr. Kravitz originally brought the records to defense counsel, who directed him to take them to the clerk. Tr. 4/2/13 at 3. Defense counsel did not review the records. Id.

The court issued a memorandum of decision in which it denied the defendant's motion for an evidentiary hearing on the grounds that there was no exception to the consent requirement contained in the statute. Memo. of Decision at 5 (A53). As a result, the court never reviewed the records that were subpoenaed to the clerk's office.[4] In its decision, the court summarized the issues as follows: (1) does Conn. Gen. Stat. § 52-146e apply to the information that the defendant seeks; (2) do any of the exceptions enumerated in the statute apply, given that the administrator of the decedent's estate refuses to consent to disclosure of the records; and (3) if none of the exceptions apply, does the defendant's desire to put on a self-defense case warrant piercing the privilege. Memo. of Decision at 2 (A50). The court concluded that the privilege applied, and that none of the exceptions contained in the statute were applicable because the patient was deceased, unable to waive the privilege, and the administrator of the estate had not consented. Id. at 3-4 (A51-A52). In light of those rulings, the court went on to conclude that there was no basis for waiving the privilege:

> It is well settled that a court may not pierce the psychiatric privilege where, as here, there is no specific statutory authorization for doing so. "In the absence of express consent by the patient, courts have no authority to create non-statutory exceptions to the general rule of non-disclosure." State v. Kemah, supra, 289 Conn. 428. Accord Falco v. Institute of Living, 254 Conn. 321, 333 (2000) ("We...conclude that the psychiatrist-patient privilege may be overridden only by legislatively enacted exceptions...."); State v. Jenkins, 271 Conn. 165, 181-82 (2004) ("As we previously have recognized no exception is available beyond those contained in § 52-146f" [Internal quotation marks omitted.]). While there is no Connecticut appellate, or Superior Court, authority dealing with the specific circumstances of the present case, the

[4] At the time, it appears that the trial court did not mark the records as a court exhibit. During the pendency of the appeal, the defendant moved to enlarge the record to include as a court exhibit the records that were subpoenaed to the court. See Defendant-Appellant's Motion for Rectification and/or Enlargement of the Record (A75). The trial court has subsequently directed the clerk to mark those records as Court Exhibit 12, which should be maintained under seal. See Trial Court Order Re Motion for Rectification (A139).

> Supreme Court, in numerous cases, has taken up a related issue. That related issue is whether a defendant's right to cross examine a complaining witness can override that witness patient's right to refuse consent to disclosure. State v. Esposito, 192 Conn. 166 (1984). The procedures established in Esposito give credence to a defendant's constitutional right, specifically his right to cross-examine, in the face of privileged psychiatric records. Importantly, however, the procedures do not give a defendant the power to override the consent requirement. Rather, at most, the patient-witness is requested to consent to having his records disclosed or face having his testimony precluded. Therefore, by virtue of giving the witness the opportunity to opt out, and by doing so keeping the privilege intact, Esposito and its progeny do not violate the consent requirement, nor create an end run around § 52-146f.
>
> Therefore, in accordance with Kemah, Falco and Jenkins, and despite the Esposito procedures, this court does not have the authority to grant an extra statutory exception to the consent requirement and authorize disclosure of privileged communications.

Id. at 4-5 (A52-A53).

Subsequently, the state moved in limine to prohibit admission of the photographs of the prescription bottles that were taken at the crime scene. See Motion to Preclude Testimony of Defense Expert Witness on Effect of Medication Found at Scene (A54). Although the court declined to issue a blanket ruling precluding their introduction into evidence, it precluded the defendant from laying a foundation for them through the detective that processed the crime scene. Tr. 4/24/13 at 194-95.[5]

[5] The exhibit list, which is contained in the Appendix, indicates that defense exhibit A was "photos of medication bottles found on decedent's dresser." See Exhibit List (A20). After a review of the transcript and conversations with the clerk office, however, it appears that the photographs were of medication bottles belonging to the defendant, not D.F. See Tr. 4/24/13 at 293-94.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO CONDUCT AN IN CAMERA REVIEW OF D.F.'S RECORDS DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE.

The trial court denied the defendant's request to review the decedent's mental health records in camera on the basis that the psychiatrist-patient privilege codified at Conn. Gen. Stat. §§ 52-146e and 52-146f did not authorize her to do so. By denying the defendant an opportunity to access information that was critical to his theory of self-defense, the court committed constitutional error, depriving the defendant of his due process right to a fair trial and his Sixth Amendment rights to compulsory process and to confront the evidence against him. As discussed herein, this matter appears to be one of first impression in Connecticut. Accordingly, for reasons set forth herein, the judgment should be vacated and a new trial ordered with directions from this Court to review the records in camera, and to disclose any relevant documents to the defense.

A. Standard of Review.

The trial court determined that it lacked the authority to review D.F.'s psychiatric records in camera because there was no exception under the statute or carved out by this Court or the Appellate Court that would permit the review of privileged records in the absence of a waiver. The court's decision implicates several procedural and constitutional principles that warrant plenary review by this Court.

First, as argued by the defendant in his motion and in the hearing on April 2, 2013, the trial court's decision implicated Mr. Fay's Sixth Amendment right to confrontation and the compulsory process clause. As this Court has stated, "[t]he defendant's right to confrontation...prevents [statutorily conferred] confidentiality from being unconditional."

State v. Kulmac, 230 Conn. 43, 57 (1994). A long line of cases starting with State v. Bruno, 197 Conn. 326 (1985) and State v. Esposito, 192 Conn. 166 (1984) has made clear that a defendant has a Sixth Amendment right to inquire into the mental condition of a witness where that condition may have impacted the capacity of the witness to observe, recollect and narrate an occurrence. Esposito, 192 Conn. at 176. Although in this case, the confrontation right did not contemplate cross-examination of the individual whose records were at issue, it concerns the defendant's ability to confront other witnesses who testified about evidence indicating the defendant was the initial aggressor. The compulsory process clause was also implicated because the defendant was deprived of "the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies." State v. Carter, 228 Conn. 412, 422 (1994).

Although not specifically raised in the defendant's argument at the trial court, the defendant's due process rights are also implicated. In cases such as this where the refusal to conduct an in camera review deprives the defendant of an opportunity to advance his theory of defense, and it deprives him of potentially exculpatory material prior to the commencement of trial, his due process rights are at issue. See State v. Santiago, 305 Conn. 101, 225-26 (2012) (noting that the in camera process is rooted in the due process clause, although case law in Connecticut has not been entirely consistent as to whether the pretrial review of statutorily privileged records implicates the confrontation clause or the due process right to a fair trial).[6]

[6] This Court in Santiago decided not to resolve this inconsistency because in that case, which concerned the access to statutorily protected information for the mitigation case in a

It is also clear that this evidence implicates the defendant's right to present a theory of defense. As this Court has held, "an accused may introduce evidence of the violent, dangerous or turbulent character of the victim to show that the accused had reason to fear serious harm, after laying a proper foundation by adducing evidence that he acted in self-defense and that he was aware of the victim's violent character." State v. Miranda, 176 Conn. 107, 109 (1978). A trial court's exclusion of such evidence "[may] [deprive] the defendant of his sixth amendment right fairly to present to the jury his version of the facts."; State v. Carter, 228 Conn. at 428 (holding that exclusion of victim's record for assaults impaired both the defendant's Sixth Amendment right to fairly present to the jury his version of the facts, and the constitutional right to present a defense, as the convictions would have corroborated the defendant's testimony that the victim was a violent person who had injured him in the past). See also Conn. Code Evid. § 4-4(a)(2). Although the defendant did not specifically advance a due process argument at the trial court level, he advanced generalized public policy and public interest arguments.

A due process claim is appropriate for review where the requirements of State v. Golding, 213 Conn. 233, 238-39 (1989), have been satisfied. Here, the record is complete as it contains not only the trial court's memorandum of decision on the issue, but also the records at issue, which have been marked as a sealed court exhibit. See Trial Court Order Re: Defendant-Appellant's Motion for Rectification (A139). The claim implicates the defendant's constitutional rights as it infringes on his access to exculpatory material and his right to a fair trial, namely to advance his theory of defense to the jury, and the alleged violation clearly exists and deprived the defendant of a fair trial, as it denied him the

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death penalty matter, there were no confrontation clause concerns. Santiago, 305 Conn. at 225.

opportunity to fairly present his theory of defense. In addition, for reasons discussed infra, the state cannot demonstrate the harmlessness of the constitutional violation beyond a reasonable doubt.

Since this case also presents a procedural issue regarding the method by which the trial court engages in an in camera review, this Court's review should be de novo. On previous occasions, this Court has distinguished between the standard of review in cases where there is a question of whether the trial court made a proper determination as to the records to be disclosed, and cases presenting a question regarding the procedure used by the trial court in conducting its in camera review. See State v. Kemah, 289 Conn. 211, 221 n 12 (2008) (noting that a question of whether a defendant has made a preliminary showing to necessitate an in camera review or whether the records contain information warranting disclosure warrant an abuse of discretion standard, but a question of the procedure to be followed before disclosing the records is a matter of law).

Accordingly, for all of the above reasons, this Court's review should be plenary.

B. This Court should Balance the Interest in Protecting the Confidentiality of Privileged Communications Against the Constitutional Rights of the Defendant and Permit Trial Courts to Conduct an In Camera Review of Privileged Records Even in the Absence of a Waiver.

i. Pertinent Connecticut case law

As stated above, this matter appears to be one of first impression in Connecticut. Although there is an abundance of case law directing a trial court how to proceed when there is a testifying witness who has not waived the privilege, see Esposito, Kemah, there does not appear to be any other Connecticut court that has confronted the situation where the witness cannot waive the privilege because he or she is deceased, and the administrator declines to waive the privilege on the decedent's behalf. This led the trial

court here to conclude that "a court may not pierce the psychiatric privilege where, as here, there is no specific statutory authorization for doing so." Memo. of Decision at 4 (A52).

Conn. Gen. Stat. § 52-146e provides that "no person may disclose or transmit any communications and records or the substance or any part of any resume therefore which identify a patient . . . without the consent of the patient or his authorized representative." This Court, however, has not treated this as an absolute. In Esposito, this Court recognized that despite the "broad sweep" of Conn. Gen. Stat. § 52-146e, that mandate had to be weighed against the defendant's Sixth Amendment right of confrontation, which was "not a privilege, but [an] absolute right and if one is deprived of a complete cross-examination he has a right to have the direct testimony stricken." 192 Conn. at 179. Accordingly, in the face of "reasonable grounds" that the failure to produce the records would impair the defendant's right of confrontation, a trial court could strike the testimony of a witness who does not consent to the release of his or her records. Id. at 180. This Court has extended this notion that a "defendant's right of confrontation . . . prevents such confidentiality from being unconditional," to other records such as DCYS records. State v. Kulmac, 230 Conn. 43, 57 (1994). In State v. Santiago, 305 Conn. 101, 213 (2012), this Court addressed access to statutorily privileged records in the context of sentencing, holding that a defendant facing the death penalty may access statutorily privileged DCF records to establish a mitigation case. Although that access is not "unfettered," the defendant's constitutional rights are protected by the court's in camera review of the files at issue. Id. It is clear, as this Court has repeatedly held, that a defendant's right of confrontation and due process rights must be balanced against the witness' statutory right to confidentiality, but this Court has not yet had an opportunity to contemplate this balance

where, as here, there is no waiver of the privilege, the records are relevant, and since there is no witness testimony to preclude, there is no recourse for the defendant.

Unlike Esposito, where a witness who withholds his or her consent can be precluded from testifying, there is no remedy for falling to permit access to D.F.'s records because there was no testimony to preclude. The state had no interest in eliciting information about D.F.'s psychiatric treatment or prescription medications because it only had to satisfy its burden to prove the elements of the offense charged, and could more easily sustain its burden on the self-defense charge in the absence of any additional evidence indicating D.F. was the initial aggressor. The evidence sought would have demonstrated D.F.'s aggressive and agitated behavior, particularly how the medications he was prescribed exacerbated the alcohol consumed on the night of the altercation. A neighbor who testified at the trial witnessed D.F. physically restraining Mr. Fay on the porch shortly before the shooting. Mr. Fay testified as to what transpired in the house, and explained that in the years before the incident, D.F. lost his job for work-related depression, various medications had been prescribed to D.F. that included Prozac, Valium, Risperdal and Librium, and that very recently, D.F.'s behavior had changed, as his depression and drinking intensified. Tr. 4/30/13 at 555, 558-59, 563. The defendant needed, however, to corroborate this with the testimony of Dr. Kravitz and/or D.F.'s medical records to give credence to the theory that the combination of those prescription medications and alcohol led to aggressive behavior.

This Court held in Falco v. Institute of Living, 254 Conn. 321, 333 (2000) that "the psychiatrist-patient privilege may be overridden only by legislatively enacted exceptions," an axiom that the trial court relied on here when declining to review the decedent's records in camera. That holding, however, which was issued in a civil case, cannot override the

constitutional interests of a criminal defendant without any balancing test by the court.

Notably, as the Court emphasized in Falco, the legislature has carved out some exceptions to the bar against disclosure, one of which permits the family of a homicide victim to access the medical records of a defendant who has been found not guilty by reason of insanity for use in a civil action against the patient. Falco, 254 Conn. at 330; Conn. Gen. Stat. § 52-146f(7). Although the passage of this exception was related to a particular case, see id. at 331, it is worth noting that if a victim's family can access a defendant's privileged communications to advance its civil case, it logically follows that a criminal defendant should be permitted to access the records of a decedent where the theory of defense is that the victim was the aggressor that led to the homicide charge. Similarly, Conn. Gen. Stat. § 52-146f provides that privileged communications may be disclosed in a civil proceeding not only where the "patient introduces his mental condition as an element of his claim or defense," but also "after the patient's death, when his condition is introduced by a party claiming or defending through or as a beneficiary of the patient and the court or judge finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between patient and psychiatrist be protected." Conn. Gen. Stat. § 52-146f(5). If a court is permitted to strike an "interest of justice" balance in the context of a civil proceeding after the patient has died, certainly that should extend to criminal proceedings where the defendant's constitutional rights are at stake.

ii. This Court should follow reviewing courts in other jurisdictions that have directed the trial courts to conduct in camera reviews of medical records even in the absence of a waiver.

Courts in other jurisdictions have addressed this issue of how to balance a defendant's constitutional rights against the statutory privileges of witnesses where there has been no waiver by the privilege-holder. In these cases, the constitutional right of the defendant will prevail where a defendant can establish a reasonable basis to believe that the records are relevant.

The starting point on this issue is Pennsylvania v. Ritchie, 480 U.S. 39 (1987), which this Court explored at length in State v. Santiago, 305 Conn. at 222 (the in camera review procedure is a "well established procedure that accords with the federal due process clause as interpreted by the Supreme Court in [Pennsylvania v. Ritchie]"). In that case, a defendant issued a subpoena to Pennsylvania Children and Youth Services seeking records of the victim, his daughter. Id. at 43. The Court, adopting a due process analysis instead of one based on the sixth amendment, held that the defendant had a right to exculpatory evidence, and that such due process right was satisfied by the court conducting an in camera review of the records. Id. at 58. A distinguishing fact in that case, however, was that the statute governing the confidentiality of the CYS records allowed for disclosure pursuant to a court order, thereby enabling the Court to make a distinction between that case and those involving an unqualified statutory privilege, such as communications between sexual assault counselors and victims. Id. at 57.

Although Ritchie did not resolve the matter before this Court, courts in other jurisdictions have used the case as a starting point for determining how to proceed when there is a statutory privilege without express provisions for a waiver. In several

jurisdictions, the courts have ultimately concluded that a court should conduct an in camera review of medical or mental health records when the defendant can make a reasonable showing that the information contained therein may be relevant, even where there is no waiver of the privilege. See e.g., Bobo v. State, 349 S.E.2d 690 (Ga. 1986) (holding that where a defendant establishes a prima facie need for discovery of privileged information, a witness' statutory privilege must give way); State v. Peseti, 65 P.3d 119, 128 (Haw. 2003) ("when a statutory privilege interferes with a defendant's constitutional right to cross-examine, then, upon a sufficient showing by the defendant, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights."); People v. Dace, 449 N.E.2d 1031, 1035 (Ill. App. 1983), overruled on other grounds, People v. Schmidt, 533 N.E.2d 898 (Ill. 1988) (instructing courts that when a witness or therapist seeks to invoke the privilege, the court should conduct an in camera hearing to determine the relevance of the material requested, as such an approach "balances a defendant's sixth and fourteenth amendment rights with a witness' right to confidentiality of his mental health records."); People v. Stanaway, 521 N.W.2d 557, 574 (Mich. 1994) (following the majority of jurisdictions to hold that due process requires a judge to conduct an in camera review of privileged records upon showing a good-faith belief that there is a reasonable probability the records contain information that is material to the defense); State v. McBride, 517 A.2d 152, 159 (Sup. Ct. N.J. 1986) (finding it error for the trial court to have refused to conduct an in camera review of psychological records to determine relevance, as the psychologist-patient privilege "may be defeated where 'common notions of fairness clearly compel at least limited disclosure of otherwise confidential communications'."); State v. Green, 646 N.W.2d 298, 305 (Wis. 2002) (an in

camera review satisfies the competing interests of a patient's privileged records and the defendant's right to present a meaningful defense); Gale v. State, 792 P.2d 570, 581 (Wyo. 1990) (adopting approach articulated in Ritchie whereby the court conducts an in camera review of privileged materials, determines whether the defendant can gather the information from other sources, and assesses how the privileged evidence may relate to the defendant's theory of the case.).

Other jurisdictions have taken the procedure a step further to permit counsel to review the records, acknowledging that the trial court judge may not be the best person to properly assess the materiality of the information contained in the records. See Commonwealth v. Stockhammer, 570 N.E.2d 992 (Mass. 1991) (after the defendant advances a good faith factual basis to believe the records are relevant, the court conducts an in camera review for relevancy, and then discloses the records to defense counsel to determine whether disclosure is required for a fair trial).

The determination that the statutory privilege should yield under the circumstances is buttressed by comparable situations where courts have pierced other privileges. For instance, some courts have analogized this to the competing rights at play in cases where a defendant seeks the identity of a government informant. See e.g., State v. Green, 646 N.W.2d 298, 306 (Wyo. 2002) (noting the similarities to the procedure for determining whether to disclose a confidential informant). At least one court has made the comparison to when a psychiatrist is compelled to testify against a defendant under the crime exception, holding that "the public policy reasons favoring a breach of the psychotherapist-patient privilege when it will prevent harm to a person or property thus would seem to be

equally compelling when a breach would prevent imprisonment of an innocent person." United States v. Alperin, 128 F.Supp.2d 1251, 1253 (N.D. Ca. 2001).[7]

Several courts have extended the same procedure to cases where, as here, a defendant seeks to demonstrate through a victim's mental health records that he or she was the initial aggressor, thereby supporting a claim of self-defense. In one federal case, the defendant moved pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure for a subpoena duces tecum directing a psychiatrist to produce the treatment records of the deceased victim in the case. United States v. Hansen, 955 F.Supp. 1225, 1225 (D. Mont. 1997), reversed on other grounds, 145 F.3d 1342 (9th Cir. 1998) (unpublished opinion). After concluding that the psychotherapist had standing to assert the privilege on behalf of his deceased client, the court concluded that the subpoena should issue:

> In [Jaffe v. Redmond, 116 S.Ct. 1923 (1996)], the Court found that the important public and private interests underlying the privilege outweighed the "modest" evidentiary benefit that would likely result from denial of the privilege. Jaffe, 116 S.Ct. at 1929. Here, in contrast, the likely evidentiary benefit is great: The defendant is charged with homicide and faces a possible loss of liberty. The mental and emotional condition of the deceased is a central element of her claim of self-defense. The holder of the privilege has little interest in preventing disclosure, because he is dead. The public does have an interest in preventing disclosure, since persons in need of therapy may be less likely to seek help if they fear their most personal thoughts will be revealed, even after their death. However, I find that the defendant's need for the privileged material outweighs this interest.

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[7] Conversely, there are some jurisdictions that have declined to engage in this balancing test to determine if a witness' privilege can be overridden by constitutional principles, concluding generally that in the absence of a waiver, the privilege cannot be undone. See People v. District Court, 719 P.2d 722, 727 (Colo. 1986); State v. Famiglietti, 817 So.2d 901, 906 (Fla. App. 2002). In some of these cases, however, the Court has distinguished between pretrial discovery, where the privilege would not give way, and confrontation issues arising at trial, which could require an overriding of the privilege. See People v. Hammon, 938 P.2d 986, 993 (Cal. 1997); Commonwealth v. Wilson, 602 A.2d 1290, 1296-98 (Pa. 1992).

Id. at 1226. In United States v. Alperin, 128 F.Supp.2d at 1253, the court granted the request for a subpoena for the victim's mental health records over the victim's objection where the information was potentially material to the defendant's claim of self-defense. Similarly, in State ex rel. Romley v. Superior Court, 836 P.2d 445, 452 (Ct. App. Ariz. 1992), the Arizona Court of Appeals remanded the case to the lower court for a determination of whether the victim's mental health records were exculpatory. Even if the victim has refused a discovery request for psychiatric records, where the trial court determines that Brady and due process guarantees require disclosure and that the material contained in the records is "exculpatory and...essential to present of the defendant's theory of the case" then "the defendant's due process right to a fundamentally fair trial and to present the defense of self-defense overcomes the statutory physician patient privilege." Id. See also State v. Bolaski, 95 A.3d 460, 477 (Vt. 2014) (remanding case for trial court to determine admissibility of victim's medical records where his mental health, particularly, the prescription medications that were in his system of his death, could have been material to the defendant's claim of self-defense); State v. Heemstra, 721 N.W.2d 549, 563 (Iowa 2006) (ordering on remand that the trial court conduct an in camera examination of the victim's mental health records where "the information sought might reasonably bear on the defendant's possibility of success in supporting his claim of self-defense.").

Some jurisdictions have taken the additional step of expanding the legislative exception to the privilege that allows for disclosure not only where the patient makes his mental condition an element of his claim or defense (which is an exception under Connecticut law, see Conn. Gen. Stat. § 52-146f(5)) but also when a party relies on the mental condition as an element of a claim or defense. See Okla. Stat. 12, § 2503 ("in any

proceeding in which any party relies upon the condition as an element of the party's claim or defense is qualified to the extent that an adverse party in the proceeding may obtain relevant information regarding the condition by statutory discovery."); Oregon Rev. Stat. § 40.230 (there is no privilege "after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense."); Wis. Stat. § 905.04 ("There is no privilege under this section as to communications relevant to or within the scope of discovery examination of an issue of the physical, mental or emotional condition of a patient in any proceedings in which the patient relies upon the condition as an element of the patient's claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense."). The Wisconsin legislature took the matter a step further by providing that "[t]here is no privilege in trials for homicide when the disclosure relates directly to the facts or immediate circumstances of the homicide." Id.

Although there are instances where courts have disagreed, the majority has concluded that the privilege cannot be used to deprive the defendant of his constitutional rights. Similarly, this Court should require an in camera review by the trial court when a defendant is able to establish some degree of relevance, even if the privilege holder is not available to waive the privilege. The Esposito court concluded that judicial intervention by way of in camera review satisfied the necessary balance between the interests of the privilege-holder and the constitutional rights of a criminal defendant. The defendant here asks this Court to allow that same judicial intervention when a waiver cannot be obtained and there is no recourse to the defendant when the patient is unavailable and the administrator of the estate refuses his or her consent.

C. The Failure to Conduct an In Camera Review Was an Error that was Harmful Beyond a Reasonable Doubt.

The defendant here has made the preliminary showing that D.F. was aggressive toward others by his own testimony, and that D.F. was undergoing psychiatric treatment that may be linked to that behavior. Unlike many cases where defendants are disadvantaged by a lack of detailed information about the victim, here the defendant knew not only that D.F. was engaged in psychiatric treatment, but also why he was in treatment, where he attended treatment, and the medications that he was prescribed. There was no doubt about his prescription medications because the detectives photographed the prescription bottles when they processed the crime scene. See State's Motion in Limine (A56-A59).

The medications prescribed are known. The unknowns are numerous, including the reasons why the medication was prescribed, and the impact those medications would have had on D.F.'s behavior, particularly when mixed with alcohol and marijuana. A review of the National Institute of Health's descriptions of the medications prescribed to D.F. is enlightening on this point.[8] Risperidone, which is characterized as an "atypical

[8] Currently pending before this Court is the case of State v. Robert Santos, S.C. 19254, where the certified question before the Court asks whether the Appellate Court in State v. Santos, 146 Conn. App. 537 (2013), "properly conclude[d] that the defendant's rights under the confrontation clause were not violated by virtue of the trial court's refusal to require disclosure of certain psychiatric records of the victim." In the Appellate Court decision, the dissent noted the necessity of an expert witness to review the mental health records, and referenced the National Institutes of Health website's "simply to indicate that, had the sealed materials been disclosed to the defendant's counsel, she could have consulted similar sites to learn of their potential side effects bearing on the witness' credibility and then, using that information, consulted with and retained an appropriate expert for purposes of testifying to those side effects." State v. Santos, 146 Conn. App. 537, 558 (2013) (Borden, J., dissenting). Similarly, the defendant includes this information, which was not presented to the trial court below, to highlight the materiality of the evidence sought, and the attendant harm in not being able to present this information to the jury.

antipsychotic" that can be used to treat problems including schizophrenia and bipolar disorder, should not be taken with alcohol, and side effects may include anxiety and agitation. See National Institutes of Health, U.S. National Library of Medicine, "Risperidone" (last modified Nov. 15, 2012), available at http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694015.html (last visited June 29, 2015) (A140). Chlordiazepoxide, which can be prescribed "to relieve anxiety and to control agitation caused by alcohol withdrawal," can result in withdrawal symptoms such as anxiousness, sleeplessness and irritability if the drug is stopped suddenly. See National Institutes of Health, U.S. National Library of Medicine, "Chlordiazepoxide" (last modified Jul. 16, 2012), available at http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682078.html (last visited June 29, 2015) (A152). Diazepam, which is prescribed "to relieve anxiety, muscle spasms, and seizures and to control agitations caused by alcohol withdrawal," can also result in withdrawal symptoms if stopped suddenly. See National Institutes of Health, U.S. National Library of Medicine, "Diazepam" (last modified Oct. 1, 2010), available at http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682047.html (last visited June 29, 2015) (A157). Fluoxetine (also known as Prozac) is an antidepressant that may cause one's mental health to "change in unexpected ways," and can even make one may become suicidal at the commencement of the treatment. See National Institutes of Health, U.S. National Library of Medicine, "Fluoxetine" (last modified Nov. 15, 2014), available at http://www.nlm.nih.gov/medlineplus/druginfo/meds/a689006.html (last visited June 29, 2015) (A162).

Certainly, these medications could have been prescribed for myriad reasons, and information about the timing, dosage and consistency of D.F.'s medication regimen would

have been pertinent to the question of the impact these prescription drugs may have had on D.F. on the evening in question. This information, however, also highlights the critical nature of this evidence, because the records could also reveal that D.F. was being treated for a serious mental illness, and was taking medications that could cause him to be anxious or agitated, particularly when combined with alcohol. Conversely, even if D.F. was not taking his medication or had stopped taking them abruptly (as suggested by the state when discussing the fact that several of the medications were expired and some bottles were empty) this, too, could have resulted in anxiety and agitation, symptoms that would have been exacerbated by alcohol use. Another alternative is that the combination of these medications, with or without alcohol, could incite aggressive behavior.

William Fay testified about the events on the night in question and D.F.'s behavior and mental health treatment in the period of time leading up to the incident. Although defense counsel was able to argue to the jury that D.F. was the initial aggressor based on Mr. Fay's testimony, there was nothing to corroborate it, and to demonstrate to the jury that this was not mere speculation on the part of Mr. Fay, but that there was, in fact, a medical explanation for the behavior that Mr. Fay witnessed in D.F. Accordingly, the state cannot demonstrate that the trial court's failure to review D.F.'s psychiatrist records and receive testimony from his treating psychiatrist was harmless beyond a reasonable doubt.

CONCLUSION

This Court should vacate the conviction and remand for a new trial with directions to review the records and the testimony of Dr. Kravitz in camera.

Respectfully submitted,

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Date: July 6, 2015

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CERTIFICATION

Pursuant to Conn. Prac. Bk. §§ 62-7 and 67-2 the undersigned certifies that the attached brief and separately bound appendix are true copies of the electronically submitted brief and appendix, and that true copies were mailed first class postage prepaid this 8th day of July 2015, to: Hon. Denise Markle, c/o Clerk, Superior Court, 14 W. River Street, Milford, CT 06460; and to Susan Marks, Supervisory Assistant State's Attorney, Juris No. 401795, 300 Corporate Place, Rocky Hill, CT 06067, tel. (860) 258-5807, fax (860) 258-5828, DCJ.OCSA.Appellate@ct.gov.

It also is certified that true copies were delivered to my client, William Fay, Inmate # 377419, MacDougall-Walker Correctional Institute, 1153 East Street South, Suffield, CT 06080.

It also is certified that the brief and appendix comply with all the provisions of Conn. Prac. Bk. §67-2 including electronic delivery to all counsel of record.

The undersigned attorney hereby certifies that this brief and appendix do not contain any name or other identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that the brief complies with all provisions of this rule pursuant to Conn. Prac. Bk. §67-2.

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